1972

Stephen Paul Varoz, A Minor Appearing By And Through Benigno Varoz, His Guardian Ad Litem v. Donald D. Sevey, Administrator of The Estate of Ronald F. Sevey, Deceased, And Salt Lake County : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STEPHEN PAUL VAROZ, a minor appearing by and through BENIGNO VAROZ, his guardian ad litem, *Plaintiff-Appellant,*

vs.

DONALD D. SEVEY, Administrator of the estate of RONALD F. SEVEY, deceased, and SALT LAKE COUNTY, *Defendants-Respondents.*

Case No. 12956

BRIEF OF APPELLANT

Appeal from the District Court of Salt Lake County
Honorable James S. Sawaya, Judge

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NATURE OF CASE

This was an action by a minor, by and through his guardian *ad litem,* for the wrongful death of his mother.

DISPOSITION OF CASE IN LOWER COURT

The lower court granted the motion to dismiss of defendant Salt Lake County upon the ground that

plaintiff failed to comply with the provisions of the Utah Governmental Immunity Act.

RELIEF SOUGHT ON APPEAL

The judgment should be reversed and the case remanded for further proceedings.

STATEMENT OF FACTS

Plaintiff-appellant Stephen Paul Varoz is the four year old son of Mary Patricia Varoz, deceased, and is her sole surviving heir. Stephen was orphaned by his mother's death. Benigno Varoz, Stephen's grandfather, has been appointed guardian *ad litem* for the purpose of instituting and prosecuting the instant action.

Mary Patricia Varoz was riding as a passenger in a car driven by Ronald F. Sevey, also deceased. The vehicle was proceeding in a southerly direction on Second West Street in Salt Lake County near the intersection of that street with 3900 South Street. There is a sharp 90 degree turn in Second West where it intersects with 3900 South. The car in which Mary was riding failed to negotiate that curve, struck and rolled over a guard rail located along the edge of the curve and came to rest upside down.

As a result of this accident, Mary received injuries from which she died at the scene. Ronald Sevey, the driver, also received fatal injuries in this accident from which he died approximately one week later.

Minutes after the accident, Deputy Sheriff Bill VanWagenen of the Salt Lake County Sheriff's Department was present at the scene. VanWagenen took written statements from the two individuals who had witnessed the accident and also took measurements at the accident scene. Based upon these measurements, detailed diagrams of the scene of the accident were prepared by a member of the Salt Lake County Sheriff's Office. In addition, the Identification Officer of the Salt Lake County Sheriff's Office took photographs of the scene. Donald Sawaya, a Deputy Salt Lake County Attorney, was called to the scene of the accident by the Salt Lake County Sheriff's Office. Sawaya made an investigation at the scene of the accident, followed up that investigation at Cottonwood Hospital, requested that blood samples be taken from both Varoz and Sevey, and requested that a postmortem examination be performed upon Mary. (R.49).

The day after the accident, Deputy VanWagenen examined the vehicle to determine whether or not the accident had been caused by any mechanical defects. (R.50).

Deputy VanWagenen also prepared an accident report, a copy of which report was sent to the Salt Lake County Traffic Engineer shortly after the accident. That report contained the following statement by the deputy:

> Curve sign which is positioned north of the accident scene appears to be inadequate warning of

> the 90° curve ahead due to several accidents at this location involving ran off road vehicles. Guard rail has not been repaired from previous accidents and should have two or more relectorized spans with large reflectorized arrow affixed on the rail indicating road direction. Changed rail at present height is more contributory and [sic] preventative to injury and damage. (R. 50).

Within a matter of weeks following this accident, Salt Lake County caused additional warning signs and devises to be placed at the scene of the accident. (R.50).

On or about May 24, 1971, Robert Goicoechea, an attorney on behalf of Stephen's grandfather, made inquiry of the Salt Lake County Highway Department as to whether Salt Lake County or the State of Utah maintained Second West near 3900 South Street. At that time an employee of the Salt Lake County Highway Department informed him that the street was maintained by the State of Utah. As a result of this conversation, and in reliance thereon, and in good faith belief that the street was maintained by the State of Utah, on October 18, 1971, Mr. Goicoechea filed a notice of claim with the State Road Commission on behalf of Stephen. (R.41, 42).

On December 1, 1971, the State denied the claim on the ground that the street was not maintained by it but by Salt Lake County. As a result, on December 7, 1971, a notice of claim was filed with Salt Lake County on Stephen's behalf. On January 10, 1972, defendant Salt Lake County denied the claim on the

ground that it was not timely filed. (R.42). Two months after the claim was denied, this action was instituted on Stephen's behalf.

Defendant Salt Lake County moved the lower court to dismiss the action upon the ground that Stephen's notice of claim had not been filed within the limits provided in the Utah Governmental Immunity Act. This motion was heard on May 12, 1972, and taken under advisement. It was granted by the Court on May 23, 1972. (R.5, 6). From that judgment of dismissal plaintiff-appellant Stephen Paul Varoz appeals.

ARGUMENT

I

The Court erred in holding that plaintiff-appellant's claim was barred by the provisions of Section 63-30-13 *Utah Code Annotated,* 1953 *(as amended).*

It appears from the facts that the death of Mary Patricia Varoz was caused by the failure of Salt Lake County to adequately warn of the 90 degree curve in Second West Street near its intersection of 3900 South Street, in Salt Lake County, and in failing to construct and maintain guard rails on that curve. There is no doubt that under the provisions of the Utah Governmental Immunity Act, Section 63-30-1 *et seq.,* Utah Code Annotated, 1953 (as amended) the defense of governmental immunity has been waived for a wrongful

death resulting from negligent omissions of the type involved in the instant action.

Section 63-30-8 of that act provides:

> Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street * * * or other structure located thereon.

The term "injury" is defined in section 63-30-2 as follows:

> (6) The word "injury" means death, * * * that would be actionable if inflicted by a private person or organization.

In *Bramel v. Utah State Road Commission*, 24 Utah 2d 50, 465 P.2d 534 (1970), this court upheld the trial court's determination that the Commission was negligent in failing to adequately warn of a sharp curve in a detour on Interstate Highway 15, which negligence resulted in personal injury and property damage. That case arose under the Utah Governmental Immunity Act.

The sole ground upon which the judgment of dismissal was entered was that plaintiff-appellant failed to comply with the requirements of section 63-30-13. That section provides:

> A claim against a political subdivision shall be forever barred unless notice thereof is filed within ninety days after the cause of action arises; * * *.

While it is true that plaintiff-appellant's notice of claim was not filed within ninety days after the accident, it is clear that plaintiff-appellant substantially complied with the provisions of section 63-30-13; that the purpose of that section was fulfilled by the notice of claim filed by plaintiff-appellant; that defendant Salt Lake County has suffered absolutely no prejudice as a consequence of plaintiff-appellant's failure to file a notice of claim within the short time permitted by that section, and that, under the circumstances, a severe injustice would be performed upon the minor plaintiff if his claim were deemed barred by the provisions of that section.

The rule in this jurisdiction, established both by statute and by cases, is that a statute should be liberally construed to effectuate the purpose of the statute and to promote justice. Section 68-3-2 Utah Code Annotated, 1953 (as amended). *Andrus v. Allred,* 17 Utah 2d 106, 404 P.2d 972 (1965).

The purpose of statutes requiring that notice of claims be given governmental entities was stated by the Utah Supreme Court in *Hurley v. Town of Bingham,* 63 Utah 589, 228 P. 213 (1924). In holding that a plaintiff who filed no claim at all is barred from instituting an action against a town, this court stated:

> In the first supposed case the municipality is at least notified sufficiently *to investigate the merits of the claim, which, evidently, is the main purpose of the statute.* In the second supposed case, the city received no notice of all, and the very pur-

pose of the statute is defeated * * *. 63 Utah 589 at 594, 228 P.2d 213 at 215 [emphasis added].

If, as this court has stated, the purpose of notice statutes is to provide the governmental entity with sufficient information to make a timely investigation of the merits of the claim, then the purpose of the notice requirements is served if the governmental entity has the information necessary to make an investigation, and does in fact make such an investigation, notwithstanding the fact that the notice of claim may not have been filed within the statutory time limit.

The injustice that can result from a failure by a injured person to strictly comply with a notice requirement in just this type of situation was recognized by the Idaho Supreme Court in the recent case of *Jorstad v City of Lewiston,* 93 Idaho 122, 456, P.2d 766 (1969).

In that case, plaintiff, as guardian *ad litem* of seven minor children, brought an action for the wrongful death of her husband arising out of the collision of his automobile with a street divider. Plaintiff alleged that the intersection where the accident occurred was in the process of construction and that the warning devises at the construction site were inadequate. From a jury verdict in favor of plaintiff, defendant appealed.

On appeal, defendant argued that plaintiff failed to file a timely claim under the city charter, which charter required that a written notice of claim be filed with the city within thirty days after the injury was

sustained.[1] The decedent's death occurred on January 20, 1966, and notice was served on February 17, 1967, nearly thirteen months after the accident. Defendant urged that a timely filing of the claim was a condition precedent to the bringing of the action.

After reviewing the pros and cons of notice statutes, the Supreme Court of Idaho stated:

> It is now well established law in this jurisdiction that the purpose and intent of these notice statutes is two-fold:
>
> (1) to save needless litigation and expense by providing an opportunity for amicable adjustment of the differences between the parties. [Citing cases.]; and
>
> (2) to provide "such information that the authorities may be able to make a full investigation of the cause of the injury and determine the city's liability therefore." [Citing cases.]
>
> In determining whether the purpose of the statute has been achieved, it must be borne in mind that "a substantial compliance is all that is required in specifying the time, place, character and cause of the damage * * * the object of the statute must be kept in mind, and *it should not be*

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1. Section 228 of the Charter of the City of Lewiston provides as follows:

> Before the city of Lewiston shall be liable for damages for personal injuries of any kind, the person injured or some one on his behalf shall by filing notice with the city clerk give notice in writing of such injury within thirty days after the same has been sustained, stating in such notice, when, where and how the injury occurred, and the apparent extent thereof, and the failure to so notify the city within the time and manner specified herein shall exonerate, excuse and exempt the city from liability whatsoever.

given any construction that will defeat the ends of justice." [Citing cases.]

We hold that there was substantial compliance with the statute in this case and the purposes for which the statute was designed were met. The notice was filed on February 17, 1967, and the complaint was filed on March 31, 1967. The city had a full month within which to seek an amicable adjustment of the matter. *Furthermore, and most important, the city had ample actual notice of "time, place, character and cause" of plaintiff's damage.* Police officers employed by appellant and its engineers were on the scene within hours investigating the same. *Where the city had substantial actual notice of serious injury to the potential plaintiff, it cannot complain of the plaintiff's failure to follow the letter of the formal requirements of the notice of statute.* This is particularly so where the parties in interest are minors and must rely upon others to give the required notice. [Citing cases.]456 P.2d 766 at 769, 770 [emphasis added].

See also *Funk v. Chester*, 34 Del.Co. 106 (Pa., 1946) and *Bricker v. Gardner*, 55 Daugh.Co.75 (Pa., 1944).

In the instant action a Salt Lake County deputy sheriff, other employees of the Sheriff's Office and a deputy county attorney investigated the accident, and the facts and circumstances surrounding it, as soon as it occurred. Measurements and diagrams were made of the scene, photographs were taken and written statements were received from eyewitnesses. A follow-up examination was made of the vehicle and medical tests

were performed on the accident victims. The investigation of this accident may have been routine (R. 19, 20, 21), but it was most certainly thorough. Defendant Salt Lake County could not be better prepared for this litigation had it received a notice of claim at the instant the accident occurred.

The case law in Utah relating to the filing of the notice of claim against governmental entites arose under sections 10-7-77 and 10-7-78 Utah Code Annotated, 1953 (as amended), and its predecessor sections. These sections deal with claims against cities and towns for injuries arising out of defective sidewalks, streets and other public improvements. While it is true that these cases were quite strict in construing the filing requirements of those sections, there are good reasons why this case law should not be deemed controlling in deciding cases arising under the Utah Governmental Act.

Sections 10-7-77 and 10-7-78 contain specific requirements both as to the form and to the contents of a notice of claim. As a consequence, this Court has felt constrained to strictly construe the requirements imposed by that legislative enactment even though harsh results sometimes followed. However, in enacting the Utah Governmental Immunity Act the Utah legislature did not incorporate therein the same type of notice requirements as those contained in sections 10-7-77 and 10-7-78. For example, section 63-30-13 provides:

> A claim against a political subdivision shall be forever barred unless notice thereof is filed within ninety days after the cause of action arises; provided, however, that any claim filed against a city or incorporated town under section 63-30-8 shall be governed by the provisions of section 10-7-77, Utah Code Annotated, 1953.

It does not, by its language, require that the notice be in any particular form, that it contain any particular information or even that it be in writing. Had the legislature desired that a notice meet any specific requirements, it certainly could have included such requirements in the statute, as it did in the second clause of section 63-30-13. Obviously then, the legislature did not intend that the same strict requirements which are imposed by sections 10-7-77 and 10-7-78 should be incorporated into the Governmental Immunity Act. Where, as here, the governmental entity has actual, ample notice of the facts and circumstances out of which a claim raises, and has suffered no prejudice by the failure of the claimant to file a formal notice within the short time required, the Governmental Immunity Act should not be construed so as to defeat an otherwise meritorious action.

Further, sections 10-7-77 and 10-7-78 were deemed to create a new cause of action. Thus, in *Hurley v. Town of Bingham*, 63 Utah 589, 228 P. 213 (1924), this court, in holding that the plaintiff was barred from maintaining the action because of his failure to allege that a claim had been filed, stated:

> * * * by the great weight of authority, as we read and interpret the adjudicated cases, the presentation of a claim within the time fixed by law is a condition precedent to the bringing of action in cases of this kind. The right to institute an action in this class of cases is purely statutory. It did not exist at common law, and therefore the conditions precedent and fixed by the statute which confers the right must be complied with or the action fails. *Berger v. Salt Lake City, supra.* 63 Utah 589 at 594, 228 P. 213 at 215.

See also *Hamilton v. Salt Lake City,* 99 Utah 362, 106 P.2d 1028 (1940).

However, this court has consistently held that the Governmental Immunity Act of 1965 does not create a new cause of action but simply waives the defense of sovereign immunity in certain circumstances. In holding that the doctrine of estoppel *in pais* may be invoked against a governmental entity, this court stated in ***Rice v. Granite School District,*** 23 Utah 2d 22, 456 P.2d (1969):

> The Utah Governmental Immunity Act does not create a new cause of action; this act merely waives a defense, sovereign immunity in certain actions; see Section 63-30-5 through 63-30-10, and provides that the liability of the governmental entity shall be determined as if the entity were a private person. 23 Utah 2d 22 at 27, 456 P.2d 159 at 163.

See also *Sheffield v. Turner,* 21 Utah 2d 314, 445 P.2d 367 (1968), and *Stephens v. Salt Lake County,* 25 Utah 2d 168, 478 P.2d 496 (1970).

Under sections 10-7-77 and 10-7-78 the filing of notice of claim with a governmental entity was construed as an essential element of the cause of action itself. Under the Governmental Immunity Act, the filing requirement is at most a procedural requirement which allows the governmental entity to investigate the facts and circumstances of the case. As such, the provisions of section 63-30-13 should not be construed to bar this action by plaintiff-appellant when defendant Salt Lake Conuty had ample actual notice of the facts and circumstances which gave rise to that claim. As the Idaho Supreme Court pointed out in *Jorstad v. City of Lewiston,* 93 Idaho 122, 456 P.2d 766 (1969):

> It must be borne in mind that we are not here dealing with an action such as those arising from a fall caused by a minor sidewalk defect, which incidents cannot often be substantiated outside of the claimant's own testimony. Here there was substantial external evidence of the circumstances of the decedent's accident and all the facts were equally available to both appellant and respondent. Their advantages in gathering evidence were co-equal and they both labored under disability of Morris Kopf's [the decedent] death and consequent failure of testimony as to the cause of the accident. If the appellant was unduly prejudice by lack of timely notice, it should have shown the nature of its prejudice. 456 P.2d 766 at 770.

II

The lower court erred in failing to hold that defendant Salt Lake County should be estopped from denying the timeliness of plaintiff-appellant's notice of claim.

This court has recently held, in *Rice v .Granite School District,* 23 Utah 2d 22, 456 P.2d 159 (1969), that in appropriate circumstances the doctrine of equitable estoppel may be invoked to preclude a governmental entity from raising as a defense the statute of limitations contained in the Utah Governmental Immunity Act. See also *Farrell v. County of Placer,* 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323 (1944); *Benner v. Industrial Accident Commission,* 26 Cal.2d 346, 159 P.2d 24 (1945); *Dettamanti v. Lompoc Union School District,* 143 Cal.App.2d 715, 300 P.2d 78 (1956).

The essential elements necessary for the application of the doctrine of equitable estoppel are stated in 28 Am.Jur. 2d Estoppel and Waiver §35 as follows:

> Broadly speaking, the essential elements of an equitable estoppel or estoppel *in pais,* as related to the party to be estopped, are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the party or other persons; and (3) knowledge, actually or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action

> or inaction based thereon of such character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

It is evident from the facts of the instant case that all of the elements necessary to support an estoppel against defendant Salt Lake County are present.

Plaintiff's attorney made inquiry of the Salt Lake County Highway Department concerning the maintenance of the highway where the accident occurred. An agent and employee of the County Highway Department informed plaintiff's attorney that the highway was maintained by the State of Utah. It is obvious from the fact that the plaintiff's attorney filed his notice of claim with the Utah State Road Commission within the time permitted by statute that he relied upon that representation. As a result of his good faith belief that the State of Utah maintained the highway in question and that the information given him was correct, plaintiff's notice of claim was not filed within the short time permitted by the Governmental Immunity Act. Defendant Salt Lake County now seeks to assert that failure to bar plaintiff's claim.

Defendant Salt Lake County should not now be permitted to benefit from the false statements made by its agent and employee, in the course of his employment, and upon which plaintiff relied to his detriment.

III

The notice of claim requirement of the Utah Governmental Immunity Act violates the United States Constitution, amendment XIV, section 1, and the Utah Constitution, article I, section 2.

Section I of amendment XIV to the United States Constitution provides:

> * * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, section 2, of the Constitution of Utah provides:

> All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, * * * .

Section 63-30-4 states, in part:

> * * * wherein immunity from suit is waived by this act, consent to be sued is granted and liability of the entity shall be determined *as if the entity were a private person.* [Emphasis added].

The Utah legislature thus declared that in those cases where the defense of sovereign immunity is waived a governmental entity is to be treated as if it were a private person. However, the legislature then went on to require that, unlike a private person, a governmental entity must receive from an injured party a notice of claim within a specified period. The enactment of the

notice requirement contained in sections 63-30-12 and 63-30-13 imposes upon a person injured by a governmental entity a condition, in the form of a special statute of limitations, which is not imposed upon a person injured by another private person.

The imposition of a notice requirement upon a person injured by the wrongdoing of a governmental entity, which entity is to be treated as any other private person, denies such injured person the equal protection of the laws guaranteed to him by the Constitutions of the United States and of the State of Utah.

In *Reich v. State Highway Department*, 386 Mich. 617, 194 N.W.2d 700 (1972), plaintiff was injured in an automobile accident and filed a notice of claim with the State Highway Department 63 days after the accident. The Michigan Tort Claims Act required that notice be given within 30 days after an accident. The lower court entered judgment for the state and an intermediate appeals court affirmed that decision. Plaintiff appealed. On appeal two similar cases were consolidated with it.

After first holding that the 60 day notice provision of the Michigan Tort Claims Act, as it applied to minors, violated the due process clause of the Michigan and United States Constitutions, the Michigan Supreme Court, in reversing the decision of the trial court, stated:

> The object of the legislation under consideration is to waive the immunity of governmental units and agencies from liability for injuries

caused by their negligent conduct, thus putting them on equal footing with private tort-feasors. However, the notice provisions of the statute arbitrarily split the natural class, i.e., all tort-feasors, into two differently treated subclasses; private tort-feasors to whom no notice of claim is owed and governmental tort-feasors to whom notice is owed.

This diverse treatment of members of a class along the lines of governmental or private tort-feasors bears no reasonable relationship under today's circumstances to the recognized purpose of the act. It constitutes an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guarantees of equal protection.

Just as the notice requirement by its operation divides the natural class of negligent tort-feasors, so too the natural class of victims of negligent conduct is also arbitrarily split into two subclasses; victims of governmental negligence who must meet the requirement and victims of private negligence who are subject to no such requirement. Contrary to the legislature's intention to place victims of negligent conduct on equal footing, the notice requirement acts as a special statute of limitations which arbitrarily bars the actions of victims of governmental negligence after only 60 days. The victims of private negligence are granted three years in which to bring their action. [Citing statutes.] Such arbitrary treatment clearly violates the equal protection guarantees of our State and Federal Constitutions. The notice provision is void and of no effect. 194 N.W.2d 700 at 702.

Like the Michigan act, the Utah Governmental Immunity Act, by its notice requirement, treats victims of governmental wrongdoing differently than victims of private wrongdoing. The Utah act even discriminates among victims of governmental wrongdoing by imposing different periods for filing a notice of claim, depending upon the status of the governmental entity. Sections 63-30-12 and 63-30-13. For these reasons, the notice requirements of the Utah Governmental Immunity Act should be declared void as violative of the equal protection clauses of the Constitutions of the United States and of the State of Utah.

CONCLUSION

The notice requirements of the Utah Governmental Immunity Act are, for the reasons set forth above, invalid and void as violative of the equal protection clauses of the Constitutions of the United States and of the State of Utah.

In any event, under the circumstances of this case, it must be held that plaintiff-appellant Stephen Paul Varoz has substantially complied with the provisions of section 63-30-13 and he should be permitted to proceed with this action against defendant Salt Lake County. To do otherwise would defeat the purpose

of the Utah Governmental Immunity Act and work a grave injustice upon this minor plaintiff.

Respectfully submitted,

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